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SOME RECENT OPINIONS ON PROFIT SHARING AS A TEST OF PARTNERSHIP. It is astonishing to find intelligent judges resting satisfied with the vague and unscientific statements of what constitutes a partnership solemnly made by less intelligent judges and text writers. Take, for example, the opinion of Burgess, J., in *Mackie* v. *Mott*, 47 S. W. 897 (Supreme Court of Missouri). The court had before it a beautiful case in which to apply the common law principle that only those are partners who are co-proprietors in business, and its corollary that the inference will be against partnership where the facts are consistent with any other relation. The persons alleged to be partners were, in fact, an owner of land and a building contractor, and all the phenomena were consistent with the hypothesis that the owner had tempted the contractor to take up and complete an abandoned building scheme by offering

him a share in the ultimate profits. The court rightly decided that here was no partnership; but one searches the opinion in vain for a clear-cut and intelligible statement of what a partnership is. Theophilus Parsons is quoted to the effect that the question "must generally, and perhaps always, be determined by the intention of the parties." If by this is meant that the parties are partners if they have manifested an intention to become co-proprietors of a common business, each having all the powers and privileges that mark an owner, it is a sound but blind statement of the common law. If (as is more likely) it means that an "intention to become partners" is material to the solution of the problem, it may be disposed of by a reference to the lucid judgment of Sir George Jessel in *Pooley* v. *Driver*, 5 Ch. D. 458 (1876). Harrison, C. J., in *Gates* v. *Johnson*, 77 N. W. 407, is apparently satisfied with the familiar and well-nigh meaningless phrase to the effect that partnership exists where there is "a community of interest in a business enterprise and in the profits thereof." In pleasing contrast to these views is the recognition given by Temple, J., to *Cox* v. *Hickman*, 8 H. L. C. 268 (1868), and *Eastman* v. *Clark*, 53 N. H. 276 (1876), and the true theory of partnership which those cases expound; *Coward* v. *Clanton*, 55 Pac. 147. He denies that the California Code makes profit sharing the test of partnership. He observes that the code definition would not lack much of a good definition of a partnership if the clause in regard to a division of profits were omitted. It would read: "Partnership is the association of two or more persons for the purpose of carrying on business together." He is right. Insert the words "*as co-proprietors*" after the word "persons," and the definition accurately describes the relation. Failure to grasp the full significance of this test has just led the Supreme Court of North Carolina (*Webb* v. *Hicks*, 31 S. E. 479) to render a decision, which appears, though the report of the facts is meagre, to declare that a partnership exists upon the same state of facts which was held in *Cox* v. *Hickman* not to constitute the relation. Creditors of an insolvent arranged with the assignee to run the business in order to work out their debts. Obviously this is not a case of association for the purpose of business, but co-operation in saving planks from the wreck. Compare *Kilshaw* v. *Jukes*, 3 B. & S. 847 (1863). The North Carolina court does not even cite *Cox* v. *Hickman*, nor does it refer to the well-known New Jersey case of *Brundred* v. *Muzzy*, 25 N. J. Law, 268; Id. 674 (1857), which would have been directly in point. A much more satisfactory opinion is that of Dixon, J., in *Austin* v. *Neil*, 41 Atl. 834, in which case the Supreme Court of New Jersey applies the test of principalship or proprietorship, and reaches the conclusion that the real relation between the persons alleged to be partners was that of lessor and lessee.

OLEOMARGARINE; CONSTITUTIONALITY OF STATE LAWS REGULATING ITS MANUFACTURE AND SALE In recent years a number of states have attempted to prohibit the sale of oleomargarine within their borders. Owing to the vast amount of capital invested in the manufacture of this substance, as opposed to the wealthy dairy interests, which are inimical, as a matter of course, to its use by the public, the statutes upon this subject have been bitterly contested, and there is no slight probability of a further development of this question by the courts. The latest decision upon it is the case of *Wright* v. *State*, 41 Atl. 795 (Nov. 17, 1898), in which the Court of Appeals of Maryland affirmed the constitutionality of the statute of that state set forth below.

The following statutes have been attacked as violating provisions of the Constitution of the United States:

Maryland Act of Assembly, Cod. Publ. Laws, Art. 27, Sec. 88 (1888): "No person shall manufacture out of any oleaginous substance other than that produced from unadulterated milk, or of cream from the same, . . . any article designed to take the place of butter or cheese, . . . or shall sell or offer the same for sale as an article of food." Section 89 prohibits the manufacture or sale of such article, "*whether such article is made or produced in this state or elsewhere.*"

Pennsylvania Act of Assembly, May 21, 1885, P. L. 22, was substantially similar to the Maryland Act, except that the clause in italics was omitted.

Massachusetts Statutes, 1891, c. 58, p. 695, prohibited the sale of the aforesaid "article in imitation or butter. . . . "*Provided*, that nothing in this act shall be construed to prohibit the manufacture and sale of oleomargarine in a separate and distinct form, *and in such manner as shall advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.*"

New Hampshire Publ. Stat., 1891, c. 127, § 19, prohibited the sale of oleomargarine, "unless the same is contained in tubs, firkins, etc., marked 'oleomargarine,' . . . and, if it is a substitute for butter, *unless it is of a pink color.*"

The three last statutes have been brought before the Supreme Court of the United States on the ground that they were in conflict with the Fourteenth Amendment and the Commerce Clause. In *Powell* v. *Pennsylvania*, 127 U. S. 678 (1888), defendant was indicted for selling in Pennsylvania a package of oleomargarine manufactured in that state. The Supreme Court affirmed the decision of the Supreme Court of Pennsylvania, holding that, as to oleomargarine manufactured within the state, the Act of 1885 was a valid exercise of the police power, and not in conflict with the Fourteenth Amendment. Justice Gray dissented, and the closing words of his opinion are significant: "The prohibition of sale in any way, or for any use, is quite a different thing from a regulation of the sale or use so as to protect the health and morals of the

community. The fault which I find with the opinion of the court on this head is that it ignores the distinction between regulation and prohibition."

Next in order the Massachusetts statute was called into question. In *Plumley* v. *Massachusetts*, 155 U. S. 493 (1894), defendant was indicted for selling in Massachusetts an original package of oleomargarine manufactured in Illinois. The court held that, even though the law acted on a subject of interstate commerce, yet its plain effect was merely the prevention of deception and fraud on the public, and it was, therefore, valid under the police power. Fuller, C. J., Field and Brewer, JJ., dissented on the ground that the statute prevented the sale of oleomargarine when of a color similar to butter, even though there might have been no intention on the part of the seller to deceive the public into the belief that it was butter. "I deny that a state may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities." (Per Fuller, diss.).

Last year the Pennsylvania and New Hampshire statutes came before the court, this time the question of interstate commerce being involved in their application. In *Schollenberger* v. *Pennsylvania*, 18 Sup. Ct. 757 (1898), the Supreme Court of the United States held the Pennsylvania statute void as a regulation of interstate commerce when it acted upon original packages of oleomargarine brought from other states. The opinion of the court, delivered by Justice Peckham, is a work of exceptional learning and ability. After considering the nature and history of oleomargarine, he comes to the conclusion that, within the past quarter of a century, oleomargarine has ceased to be a "newly discovered product," which a state legislature might well prohibit on the ground that it might be dangerous to the public, but that it is a "perfectly healthful commodity" and a "nutritious article of food." Therefore, the state may not prohibit the introduction of the said nutritious food within her borders; and it is useless for her legislature to declare that the health of the inhabitants may be harmed thereby, since the question as to the nature and effect of oleomargarine is to be decided by the court and not by the legislature. From this decision Justices Gray and Harlan emphatically dissented. They denied that even at this date a court has power to say that, as regards a substance of the nature of oleomargarine, the legislature has erred when it solemnly declares its introduction into the state to be a danger to the health of the community, and the statute to be necessary to protect the people from being induced to purchase articles either not fit for food, or differing in nature from what they purport to be; but that "the questions of danger to health, and of likelihood of fraud or deception, and of the preventitive measures required for the protection of the people, are questions of fact and of public policy, the determination of which belongs to the legislative department and not to the judiciary."

At the same session of the court the New Hampshire statute was declared unconstitutional: *Collins* v. *New Hampshire*, 18 Sup. Ct. 768 (1898), Gray and Harlan, JJ., dissenting. Justice Peckham, in delivering the opinion of the court, said that, if a legislature had power to cause oleomargarine to be colored pink, they could order it to be colored in such a repulsive manner and mixed with substances so offensive to the senses that, although it might not be deleterious to the health, the public would be effectually restrained from purchasing it; therefore the statute was as bad as the one which the court had just declared void in *Schollenberger* v. *Pennsylvania*.

The question naturally arises whether, in the cases of *Schollenberger* v. *Pennsylvania* and *Collins* v. *New Hampshire*, the Supreme Court does not overrule its decisions in *Powell* v. *Pennsylvania* and *Plumley* v. *Massachusetts*. Justice Peckham says that it does not; Justice Gray says that it does. Certainly, it would seem that, at the very least, the court has taken a new position on the subject. According to the position of the majority in *Schollenberger* v. *Pennsylvania*, oleomargarine, when properly manufactured, is a healthful and nutritious article of food and a well-known and harmless commodity. Now, it is very proper to say that such an article may not be excluded by a state from interstate commerce, or its interstate transportation even regulated; but it is quite consistent for the court so say, in the same breath, that the legislature of Pennsylvania may utterly prohibit the manufacture and sale of this healthful food product within the state? Yet this was so adjudged in *Powell* v. *Pennsylvania*, for the Pennsylvania statute prohibited the sale of oleomargarine *without any exceptions whatever*, and it was admitted in that case that the purchaser was fully aware of what he was buying. If the premise adopted by the majority in *Schollenberger* v. *Pennsylvania* is correct, the conclusion is irresistible that the rights of the inhabitants of Pennsylvania to manufacture and sell this "healthy food product" are secured under the Fourteenth Amendment.

To return to the Maryland case, *Wright* v. *State*, 41 Atl. 795, it would seem that, under *Powell* v. *Pennsylvania*, the case was correctly decided, since its facts did not admit of the application of the commerce clause, the transaction being confined to oleomargarine manufactured and sold within the State of Maryland. If, however, defendant should take an appeal to the Supreme Court of the United States, there is, at least, a possibility that he would be able to secure a reversal.